BRIEF DEDUCTIONS

RELATIVE TO THE

AID AND SUPPLY OF THE EXECUTIVE POWER,

ACCORDING TO THE

LAW OF ENGLAND,

IN CASES OF INFANCY, DELIRIUM,

OR OTHER INCAPACITY OF THE KING.

[Francis Hargrave]

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ADVERTISEMENT.

MONDAY AFTERNOON, 15 DECEMBER, 1788.

NO part of the following Deductions was reduced into writing till within theſe three or four days; and by far the greater part was haſtily began to be ſketched the morning of this very day. The idea of committing them to the preſs did not occur till this very afternoon.—This will account for the imperfection and incompleatneſs of the ſketch.—The writer is of too humble a deſcription to give any perſonal weight to his opinion upon a great ſubject; and therefore the withholding of his name is of no conſequence.—He riſques this haſty publication of his ſentiments, not for the ſake of any particular party in the ſtate, but for the benefit of all parties; or rather in the hope of contributing in ſome degree towards elucidation of a dark and obſcure ſubject for the public good.—Though the writer was as important as he is the direct contrary, it would defeat his wiſh of aſſiſting to prevent error, to adopt his preſent notions further than they ſhall appear to be warranted by precedents and authorities and impartial reaſoning.

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The full expreſſion of his opinion, and the ſtatement of the authorities on which he proceeds, were not poſſible, without exceeding the time neceſſary for publiſhing his notions and to anſwer the purpoſe he has in view; the idea of publication not occurring till this afternoon; and deciſion by one houſe of parliament being poſſible to-morrow. If in the ſtile of theſe Deductions there is any thing like preſumption, it muſt be imputed to the want of time to render the phraſes of the writer more humble, and therefore more ſuitable to his inferior pretenſions.—The printed report of the committee of the commons, which contains an immenſe quantity of parliamentary record and other authority, will in great meaſure enable the forming a judgment, how far his opinions are founded in precedent and the law of England. He has indeed barely looked into that volume of matter. But his conjecture is, that he is not unfamiliar with the chief ſource of aid, which enabled, or at leaſt facilitated, the accumulation of ſo much matter in ſo ſhort a time, as has paſſed ſince the appointment of the Regency Committee of the Commons.

BRIEF

BRIEF DEDUCTIONS, &c.

SINCE firſt hearing of the calamity, by which His Majeſty has been for ſome time ſo grievouſly afflicted, I have frequently, though inſufficiently and imperfectly, inveſtigated the law of the land on the very intereſting queſtion,—What is the conſtitutional mode of ſupplying the executive power during the delirium, infancy, or other incapacity of a king of England? And on the beſt conſideration I have hitherto been able to give to this delicate ſubject, I make the following Deductions; which, being put together in very great haſte, and under the diſadvantage of interruption from profeſſional buſineſs and my own private affairs, muſt be conſidered as a mere and rough ſketch of my ideas.

(1) IT ſeems to me, that, till the two houſes of parliament appoint a regency to act for the king, the executive power is lodged,—either in the *whole peerage*, as the greateſt council of the crown next to the two houſes of parliament,—or in the *conſilium ordinarium*, which includes the privy-council, with the addition of certain officers of ſtate, and alſo of the judges, if this council ſtill exiſts—or in the *exiſting privy-council*, till the lords are aſſembled in parliament as a houſe, and then in the lords.—The former of theſe opinions is that, to

 which

which I at preſent incline.—If this be ſo, our law hath not left the executive power, in the caſe of infancy, ſickneſs, delirium, or other incapacity of acting for itſelf, not even for one moment, without a ſupply of others to act for the king, and in his name.

(2.) I conceive, that either the council of the whole peerage, or the *conſilium ordinarium*, or the privy council, being thus entitled to act for the incapable king, hath, the moment ſuch incapacity begins, the controul over the great and privy ſeal; and may and ought to uſe them in aſſembling parliament in the king's name, and ſo ſhould give the opportunity of providing a permanent regency by the higheſt poſſible authority, for the emergency of an infant or otherwiſe incapable king.

(3.) I conceive that, in order that in the caſe of the king's being diſqualified by delirium or otherwiſe from attending perſonally, there may be a repreſentative of him competent to hold the parliament for the king, and to aſſent to ſtatutes in his name, the council of lords, or the *conſilium ordinarium*, or the privy council, ought to uſe the great ſeal and privy ſeal for a commiſſion, appointing in the king's name the next in ſucceſſion to the crown, or, in caſe of his abſence from the realm, or incapacity by infancy or otherwiſe, ſome other perſonage of high rank and birth, to act as the king's lieutenant or *locum tenens* in holding the parliament and aſſenting to new laws. And this appointment of a king's lieutenant, for the purpoſes beforementioned, appears to me to have been heretofore conſidered, in caſes like the preſent, as an eſſential *preliminary* to convening or holding parliament, or ſettling a regency, or tranſacting any other parliamentary buſineſs. Indeed I have ever underſtood, that till the king upon the firſt meeting of the two houſes, whether upon the firſt day appointed for their meeting, or on a prorogation, ſhall appear in perſon or by proxy, neither houſe of parliament is ſtrictly competent to exerciſe its parliamentary functions.

tions. In other words, without ſuch appearance of the king perſonally or by repreſentation, it is not a meeting of parliament, but a mere *convention*; which ought never to be reſorted to, but in extreme neceſſity; which was the caſe at the revolution and indeed the reſtoration, but as I apprehend cannot juſtly be ſaid to exiſt in the caſe of a minority, or an incapacity of the king by delirium or otherwiſe, there being a legal mode of creating a repreſentative for the king. Nor have I a doubt, if authorities ſhall be ſearched for, that both the opinions of lord Coke, lord Hale, and other great writers, and the uſage, will be found conformable to this aſſertion of the irregularity of proceeding to buſineſs in either houſe of parliament, till the king has appeared in perſon or by proxy. The only inſtances of a king's incapacity by indiſpoſition are the two protectorſhips of the duke of York in the reign of Henry the ſixth; and in both the duke, previouſly to the meeting of parliament, had a patent to repreſent the king as his lieutenant, with authority as ſuch exerciſeable by direction of the council; which council, as I have already explained, might be the *magnum conſilium* of the lords, or the *conſilium ordinarium* conſiſting of the privy council and certain officers of ſtate and the judges, or ſimply the privy council. Now if this be a correct notion of the law and conſtitution in this reſpect, it was, in my poor and humble opinion, a great and fundamental error in the caſe now depending, not to have appointed a commiſſioner for repreſenting the king and for holding the parliament previouſly to the time appointed for the meeting on the prorogation: and if ſuch a repreſentative had been previouſly appointed, it is to be preſumed, that the prince of Wales would of courſe have been fixed upon as the proper perſon to be his father's proxy. It was alſo, as it ſtrikes me, a continuance of this error, that the two houſes have acted as if the parliament was compleat. But ſurely it is now high time for the two houſes to conſider the irregularity of acting without a repreſentation of the king by his

commiſſioner or lieutenant, and to decline further buſineſs till ſuch a proxy for the king has been appointed and ſhall meet the two houſes.

(4.) It ſeems to me, that when parliament is thus aſſembled, with ſuch a lieutenant or commiſſioner to repreſent the king and to make the parliament compleat, it reſts with the two houſes, in a parliamentary way, to ſubſtitute a permanent ſupply of the executive power, in the place of that immediate ſupply which the law provides in the mean time; and for this purpoſe to exerciſe their diſcretion in appointing either a joint regency or a ſole regency; and alſo to fix what ſhall be the powers of a regency of either kind, that is, either to veſt the executive government entire and undiminiſhed in ſuch regency, or to veſt the executive power in ſuch regency with limitation and reſtriction. Indeed it appears from the parliament roll of the 6. of Hen. 6. that in the firſt year of that unfortunate king, the duke of Glouceſter put in a claim of right to the ſole regency during his nephew's minority for the duke of Bedford, the king's eldeſt uncle and the preſumptive heir to the crown, and alſo for himſelf as next to his brother in the ſucceſſion; and that this claim was founded on two grounds, namely, the will of Henry the fifth, and *right of blood*. But according to the ſame record the lords, after hearing the reaſons for this claim, and conſulting the learned in the law, ſolemnly declared it founded *neither in precedent nor in the law of the land*. According alſo to the ſame roll of parliament both the dukes of Bedford and Glouceſter acquieſced in this deciſion of the lords in parliament, and ſubſcribed their names to an acceptance of the office of protector and principal councillor with a council of regency by authority of parliament.

(5.) It ſeems to me moſt regular, orderly, and correct, to compleat the exerciſe of this diſcretion of the two houſes of parliament by

by BILL; and ſo finally the king himſelf will become in the eye and conſideration of law a party to the tranſaction, and a regency will be conſtituted by act of parliament, the king aſſenting by his commiſſioner or lieutenant.

(6.) IT appears to me, that the two houſes of parliament have uſually hitherto exercifed their diſcretion in conſtituting a joint regency, ſometimes with a protector and principal councillor at the head of it; ſometimes without, as in the inſtance of Richard the ſecond's minority; ſometimes by generally taking the privy council exiſting at the time for a regency; and ſometimes by naming particular perſons as regent councillors.

(7.) As the two houſes of parliament have a diſcretion of modelling the regency according to the time and circumſtances, I conceive, that the precedents of a joint regency are in no degree concluſive againſt a ſole regency: and in the inſtance of the preſent calamity all ſeem to be now agreed, that a ſole regent is the moſt proper and expedient, and that the prince of Wales being of full age is without a competitor for preference with the two houſes of parliament.

(8.) As far as I know of the ſubject at preſent, I think it moſt probable, that *all*, or *almoſt all*, the precedents of former times will be found to be in favour of veſting the *entire* executive power in the intended regent, without reſtriction or limitation as to creating peers, granting offices, or doing any other acts of executive government. I ſay *all*, or *almoſt all*; becauſe I conſider the precedents of a capable king's making a *cuſtos regni* during his abſence from the realm as not fairly applicable. The reaſons alſo in point of propriety againſt reſtricting, eſpecially as to creating peers, ſeem to me equally obvious and ſtrong. Theſe are,—1. The unprovoked indelicacy and diſreſpect in ſhewing any diſtruſt of the intended regent, nothing

having been done by him to claim ſo diſtinguiſhing his regency from former regencies.—2. The tendency of reſtriction to weaken an executive government, neceſſarily more feeble than the executive power acting for itſelf; and the conſequent effects of ſo rendering calamity more calamitous.—3. The tendency of ſuch reſtriction to let in the two houſes of parliament into a participation of executive government, and into the exerciſe of the regal prerogative, and ſo confounding the fundamental diſcriminations, in point of power and office, made by our law between the king and the two houſes of parliament.—4. The manifeſt inconvenience of keeping any part of the executive power in a ſtate of ſuſpenſion and inactivity.

FINIS.